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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

FRANK PEREYDA, Plaintiffs and Respondents, v. VERITIV OPERATING COMPANY, Defendants and Appellants.	D073208 (Super. Ct. No. 37-2017-00010449-CU-OE-CTL)

APPEAL from an order of the Superior Court of San Diego County, Eddie C. Sturgeon, Judge. Affirmed in part and reversed in part.

Seyfarth Shaw, Timothy M. Rusche, Timothy M. Fisher and Kiran A. Seldon for Defendants and Appellants.

AMARTIN LAW and Alisa A. Martin for Plaintiffs and Respondents.

Five employees sued their employers, Veritiv Operating Company and Veritiv Corporation (together Veritiv), alleging wage and hour violations on behalf of themselves and a class of similarly situated workers, and seeking penalties under the Private Attorney General Act of 2004 (PAGA). With respect to three of these plaintiffs (Frank Pereyda, Alan French, and Lupe Ramirez), Veritiv moved to dismiss the class claims and to

compel individual arbitration on the non-PAGA claims. The court denied the motion based primarily on its finding that Veritiv did not prove these plaintiffs had agreed to arbitrate their claims.

Veritiv appeals this order. We affirm in part and reverse in part. We conclude the court properly denied the motion as to French and Ramirez, but erred as to Pereyda.

FACTUAL AND PROCEDURAL BACKGROUND

Complaint

Pereyda, French, Ramirez, and two other employees (all sales representatives) sued Veritiv. As amended, the complaint alleged Veritiv violated the unfair competition law and numerous wage and hour laws by failing to pay earned commissions, reimburse expenses, and provide accurate wage statements. Plaintiffs brought their claims individually and also sought to represent a class of similarly situated employees. Plaintiffs also asserted a claim for penalties under PAGA.

Petition to Compel Arbitration

Veritiv moved to compel arbitration on the non-PAGA causes of action asserted by Pereyda, French, and Ramirez. Veritiv claimed each of these three employees was bound by an arbitration agreement requiring individual arbitration, and therefore they should be ordered to arbitrate their individual claims and their class claims should be dismissed. Veritiv acknowledged the PAGA claims could not be ordered to arbitration under the language of the arbitration agreement, but asked the court to stay the PAGA claims and the individual and class claims of the remaining two plaintiffs who Veritiv said did not sign an arbitration agreement.

In support, Veritiv produced the declaration of Douglas DeCaire, a general manager of Veritiv Operating Company. DeCaire attached to his declaration an arbitration agreement prepared by a different entity, Unisource Worldwide, Inc. (Unisource). The agreement is titled "AGREEMENT CONCERNING ARBITRATION OF DISPUTES" (Unisource Arbitration Agreement). The agreement states: "By acknowledging receipt of this Agreement and continuing your employment with the Company, you hereby agree that any dispute with any party (including the Company's affiliates, *successors*, predecessors, parents, subsidiaries . . .) that may arise from or in connection with your employment with the Company . . . must be submitted for resolution by mandatory, binding arbitration." (Italics added.) The agreement provides that "[t]he [F]ederal Arbitration Act . . . shall govern the interpretation and enforcement of this Agreement." The agreement expressly prohibits class actions and representative actions, and requires arbitration "on an individual basis only." The agreement states that if any provision is deemed unenforceable, the remaining agreement is enforceable, except no class action or representative action shall "proceed in arbitration."

DeCaire also attached two sheets of paper to his declaration, each containing a printed statement: "I have received and reviewed the Unisource . . . Commission Plan for Outside Sales Professionals and the Agreement Concerning Arbitration of Disputes and understand that they apply to my employment with Unisource." Below this statement was a signature line; a "Print name" line; and a line for the date. The first sheet contained the printed name "Frank Pereyda"; a signature; and the date "8-1-12." The second sheet contained the printed name "Allen French"; a signature; and the date "8/8/2011."

To authenticate these documents, DeCaire first explained the connection between the Veritiv and Unisource entities. He said in 2014 Veritiv Corporation was formed and acquired Unisource (a business products supplier) and xpedx, LLC (xpedx) as subsidiaries. On December 31, 2015, xpedx "merged into" Unisource, and Unisource changed its name to Veritiv Operating Company. Veritiv Operating Company assumed Unisource's rights and obligations, including those arising from Unisource's employment relationships.

DeCaire said that as a general manager at Veritiv Operating Company, he is familiar with its business records, including records generated while Unisource was the employer. He said he reviewed documents from the personnel files of Pereyda, French, and Ramirez, and that these records "reveal that Mr. Pereyda, Mr. French, and Ms. Ramirez have each been continuously employed by Veritiv and its predecessor Unisource since at least 2011."

With respect to the attached Unisource Arbitration Agreement and the two signed acknowledgments, DeCaire said:

> "In about July 2012, Unisource distributed Unisource's [Arbitration Agreement] to California outside sales employees [who] . . . were required to sign an acknowledgment indicating receipt of the Arbitration Agreement.
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> ". . . Included in Mr. Pereyda's and Mr. French's respective personnel files, and maintained in the ordinary course of business, are Mr. Pereyda's and Mr. French's signed acknowledgments indicating receipt of the Arbitration Agreement. Mr. Pereyda signed an acknowledgment of the Arbitration Agreement on August 1, 2012, and Mr. French signed an acknowledgement of the Arbitration Agreement on August 8, 2012 (Mr. French's acknowledgement is erroneously dated August 8, ***2011***). . . .

> ". . . Ms. Ramirez's personnel file does not contain her acknowledgement indicating receipt of the Arbitration Agreement. This appears to be a record keeping omission in that the acknowledgement either was not placed in the personnel file or was subsequently removed from it. It was Unisource's practice to obtain a signed acknowledgement from California outside sales employees. This was particularly important because . . . the acknowledgement form was a combined acknowledgement of both the Arbitration Agreement and the Unisource . . . Commission Plan . . . . As such, Ms. Ramirez necessarily agreed to arbitrate because she received commissions pursuant to the plan every year of her employment since at least 2011."

Relying on DeCaire's declaration and the two attachments (the Pereyda and French acknowledgements), Veritiv argued that Pereyda, French, and Ramirez were bound by the Unisource Arbitration Agreement to individually arbitrate their non-PAGA claims against Veritiv.

Plaintiffs' Opposition to Motion to Compel

Plaintiffs opposed the motion. They argued DeCaire lacked personal knowledge pertaining to the claimed arbitration agreement because he never worked for Unisource and had no knowledge of events occurring at Unisource in 2012, including the distribution and collection of the Unisource Arbitration Agreement. Additionally, they argued (and submitted supporting evidence) that neither French nor Ramirez ever received the Unisource Arbitration Agreement or signed an acknowledgment regarding the agreement.

As to French, plaintiffs argued the signature on the acknowledgment form was not his signature. French's supporting declaration stated in relevant part:

> "I do not recall ever receiving the [Unisource Arbitration Agreement] attached to . . . DeCaire's declaration . . . . I do not recall anyone at Unisource discussing the arbitration agreement with me or explaining its terms to me. I did not sign the acknowledgement form attached to DeCaire's declaration . . . . That is not my signature or the correct spelling of my name. I do not spell my first name as A-L-L-E-N. My first name is spelled A-L-A-N. I did not authorize anyone to sign the acknowledgement form on my behalf."

As to Ramirez, plaintiffs argued she never received the Unisource Arbitration Agreement and does not recall ever signing an acknowledgement form. Ramirez's supporting declaration stated in relevant part:

> "When I started working at Unisource . . . in 2010, I received 100% commissions. In 2012, Unisource changed my compensation to salary with no commissions. In late 2014, . . . my compensation structure changed to salary plus 5% commissions. . . .
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> ". . . According to DeCaire, Unisource distributed [the Unisource Arbitration Agreement] . . . to California outside sales employees in about 2012. I never received the arbitration agreement. I also do not recall anyone at Unisource discussing the arbitration agreement with me or asking me to agree to its terms. I did not sign an acknowledgement form like the ones attached to DeCaire's declaration . . . or any other form in which I agreed to arbitration or waived my right to pursue any type of class, collective or representative claims."

As to Pereyda, he submitted his declaration acknowledging the signature on the acknowledgement looked like his, but said he did not remember signing the document. He said that if he signed the form, it would have been under duress. He also asserted there was no evidence he ever received the Unisource Arbitration Agreement, noting the agreement and the acknowledgement form were separate documents. Plaintiffs also argued the arbitration agreement is unenforceable because it bars public injunctive relief,

citing *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945 (*McGill*), and asserted that arbitration would be improper if all other plaintiffs litigated their identical claims in court, citing to a provision in the California Arbitration Act, Code of Civil Procedure section 1281.2, subdivision (c).[1]

Each of these plaintiffs also asserted in their declarations that DeCaire did not work for Unisource before it merged with xpedx in 2015, including during the relevant 2012 time frame.

Plaintiffs also filed numerous evidentiary objections to DeCaire's declaration, including a lack of personal knowledge, lack of foundation, and reliance on inadmissible hearsay.

Veritiv's Reply

In reply, Veritiv argued that DeCaire properly authenticated the acknowledgement forms based on his review of plaintiffs' personnel files, and it was not necessary that he have personal knowledge about the manner in which the Unisource Arbitration Agreement was distributed and collected. Veritiv produced DeCaire's reply declaration, in which he said he was familiar with Unisource's policy "of requiring its commissioned outside sales employees to enter into arbitration agreements" through his review of Unisource documents and records.

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1 All unspecified statutory references are to the Code of Civil Procedure. For readability, we shall omit the word "subdivision" when referring to section 1281.2, subdivision (c).

With respect to French, Veritiv acknowledged that French's printed name appeared to have been misspelled on the acknowledgement form, but argued that French's signature was genuine because it was similar to other signatures on documents found in French's file. DeCaire attached to his reply declaration various documents from French's personnel file showing French's signature. DeCaire also attached an August 9, 2012 letter, which DeCaire said was found in French's personnel file; the letter is addressed to French at Unisource's business address and states that it encloses the commission plan and arbitration agreement and "your signed acknowledgement of receipt." DeCaire also denied "fabricat[ing] or forg[ing] any documents concerning Mr. French or any of the other plaintiffs in this case," or "direct[ing] anybody else to do so . . . ."

Veritiv additionally produced the declaration of Mitchell Sagowitz, French's current supervisor who also supervised French at Unisource "since at least the beginning of 2012." Sagowitz discussed his general practice of regularly collecting signed acknowledgments from his direct reports, and said he remembered "providing documents to Mr. French numerous times during my supervision of him, including his commission plans." Sagowitz did "not recall any time that Mr. French did not sign and return the documents provided to him." Sagowitz did not refer to, or mention, any arbitration agreements presented to or signed by French.

Veritiv also produced evidence that Ramirez received commissions from February 2012 through September 2013. Veritiv thus argued that her claim that she did not sign the acknowledgement is based on a false premise that she did not receive commissions in 2012.

As to Pereyda, Veritiv argued that Pereyda's statement that he does not recall signing the acknowledgement form is irrelevant and should be disregarded. Regarding Pereyda's assertion that the agreement prohibits injunctive relief, Veritiv stated the Unisource Arbitration Agreement permits a plaintiff to be awarded injunctive relief, but requires this requested relief to be asserted in arbitration.

Surreply

In their surreply, plaintiffs objected to the court considering the new points raised in Veritiv's reply brief (except on the issue of French's signature, which it conceded to be proper reply evidence). Plaintiffs also maintained the new evidence does not show a valid arbitration agreement with any of the plaintiffs.

As to French, plaintiffs argued the new documents support that he did not sign the acknowledgement form because (1) the documents show he generally printed his own name and he spells his name correctly when he does so; (2) French's signature on the newly-produced documents does not match the signature on the acknowledgement form; and (3) Veritiv did not produce any witnesses who say they saw French sign the agreement.

Plaintiffs also produced French's supplemental declaration reiterating that the signature on the acknowledgement form was not his signature, and he did not recall seeing the August 9 letter attached to DeCaire's reply declaration. Plaintiffs' attorney also created a five-page signature comparison chart showing the alleged invalid signature with French's admitted signatures.

As to Ramirez, plaintiffs argued that although it appears Ramirez "may have been [mistaken] on the timeframe as to when she stopped earning commissions," there remains no credible evidence to rebut her statements under penalty of perjury that she "never received the Unisource Arbitration Agreement or signed an acknowledgment form."

Plaintiffs also asserted evidentiary objections to portions of Veritiv's reply declarations.

Court's Ruling

After a hearing (that was not reported), the court denied Veritiv's motion to compel arbitration in its entirety and issued a lengthy written order explaining this ruling. Because the parties rely on various parts of the order to support their appellate arguments, we quote significant portions of the court's order:

> "[Veritiv] failed to meet [its] burden to show plaintiffs [French and Ramirez] entered into a valid arbitration agreement. The court disregards the surreply and the new evidence submitted in the reply. The court considered the rebuttal declaration of Douglas DeCaire with regard to the additional signatures of plaintiff French.
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> ". . . DeCaire states that Unisource in or about July 2012 'distributed' the agreement, and that California outside sales employees were required to sign an 'acknowledgment indicating receipt of the Arbitration Agreement.' . . . Though he is the current general manager, he does not disclose he was familiar in 2012 with the human resources procedures for obtaining the acknowledgment. DeCaire can testify based upon personal knowledge there was an acknowledgment in French's file and none in Ramirez's file. . . .
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> "French stated . . . 'I did not sign the acknowledgement form attached to DeCaire's declaration . . . . That is not my signature or the correct spelling of my name. . . .' . . . [Veritiv] submitted other signatures in the reply declaration to support the signatures are 'manifestly similar.' The court is not a handwriting specialist, but the court noticed the "F" on the samples in the files are consistent in the

exhibits, in contrast to the acknowledgment. No declaration was presented by a handwriting specialist to overcome French's declaration. . . .

"Notwithstanding the arbitration agreement includes words of agreement, the acknowledgment itself provides that the employees 'understand' the rules apply . . . . The acknowledgment in this case is similar to those in *Mitri v. Arnel Management Co.* (2007) 157 Cal.App.4th 1164, 1173. . . . [¶] Conspicuously absent from the acknowledgment receipt form is any reference to an *agreement* by the employee to abide by the employee handbook's arbitration agreement provision. . . .

"[Veritiv] assert[s] an employer may prove the existence of an arbitration agreement by means of circumstantial evidence . . . . [Veritiv] contend[s] the acknowledgment form was a condition of receiving commissions. The court disagrees. First, merely because it was Unisource's 'practice' to obtain a signed acknowledgment, does not establish the practice was strictly enforced. . . . Because defendants have failed to meet their burden of proof that French and Ramirez signed the acknowledgment, this court will not imply the existence of such an agreement between the parties merely because they received commissions. (See, *Gorlach v. Sports Club Co*. (2012) 209 Cal.App.4th 1497, 1509.) Accordingly, French and Ramirez are not ordered to arbitration.

"Had Frank Pereyda been the only plaintiff involved in this case, [Veritiv] might have met [its] burden of proof because a close examination of the acknowledgment language may have not have been challenged. On its face, the arbitration agreement . . . is not substantively unconscionable. The facts that Pereyda cannot dispute his signature combined with the acknowledgment in his personnel file would have glossed over the threshold issue the court must address, i.e., whether there is a valid agreement. . . . However, as set forth above, the acknowledgment is ambiguous at best, and there are now four of the five class plaintiffs who are proceeding with this court action. Even if the court could find Pereyda consented to arbitration, the court denies defendants' motion to remove only one plaintiff to arbitration. Although this court acknowledges the Federal Arbitration Act governs, the court will not ignore . . . section 1281, and the increase[d] risk of conflicting rulings on common issues of fact or law, as well as the waste of judicial resources and burden on plaintiffs."

On the evidentiary objections, the court sustained plaintiffs' objection to DeCaire's statement in his reply declaration that he was personally aware of Unisource's policies based on his review of Unisource documents and records. But the court overruled the objections to two paragraphs of DeCaire's declaration in which DeCaire (1) stated he had reviewed Ramirez's personnel file and found information in the file showing Ramirez earned commissions from 2012 to 2013, and attached those materials to his declaration; and (2) denied that he forged any documents or directed anyone to do so. On Sagowitz's declaration, the court sustained objections to most of the declaration, except for the paragraph in which Sagowitz denied he fabricated or forged any documents, or directed anyone to do so. The court also sustained objections to a reply declaration of a Veritiv human resources employee discussing the fact that Ramirez earned commissions from February 2012 to September 2013.

Veritiv appeals.

DISCUSSION

I. *Legal Principles*

"In ruling on a motion to compel arbitration, the trial court shall order parties to arbitrate 'if it determines that an agreement to arbitrate the controversy exists . . . .' [(§ 1281.2.)] '[T]he party seeking arbitration bears the burden of proving the existence of an arbitration agreement by a preponderance of the evidence, and the party opposing arbitration bears the burden of proving by a preponderance of the evidence any defense . . . .' [Citation.] In evaluating an order denying a motion to compel arbitration, ' " 'we

review the arbitration agreement de novo to determine whether it is legally enforceable, applying general principles of California contract law.' " ' [Citation.] If the trial court resolved contested facts, we 'review the court's factual determinations for substantial evidence.' " (*Nielsen Contracting, Inc. v. Applied Underwriters, Inc.* (2018) 22 Cal.App.5th 1096, 1106; accord *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413 (*Rosenthal*).)

When there is a factual dispute as to whether the parties agreed to arbitration, "[t]he trial court sits as the trier of fact, weighing all the affidavits, declarations, and other documentary evidence . . . to reach a final determination." (*Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 842 (*Ruiz*); accord *Espejo v. Southern California Permanente Medical Group* (2016) 246 Cal.App.4th 1047, 1057 (*Espejo*).) We " ' "construe any reasonable inference in the manner most favorable to the [order], resolving all ambiguities to support an affirmance." ' " (*Cox v. Bonni* (2018) 30 Cal.App.5th 287, 300.) If substantial evidence supports the finding, the reviewing court must uphold the finding "no matter how slight it may appear in comparison with the contradictory evidence . . . ." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.) "This is true whether the trial court's ruling is based on oral testimony or declarations." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479.)

There is a strong public policy favoring arbitration. However, under federal and state law, this policy applies only if a validly formed and enforceable arbitration agreement exists. (See *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*); *Toal v. Tardif* (2009) 178 Cal.App.4th

1208, 1219-1220; *County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237, 244-245.)

II. *Analysis*

Veritiv contends the court erred in refusing to order each of the three plaintiffs to individual arbitration on their non-PAGA claims because each agreed to be bound by the Unisource Arbitration Agreement and this agreement governs the current disputes between Veritiv (Unisource's successor) and Veritiv's employees. We examine this contention separately with respect to each plaintiff.

A. *Ramirez*

The court found Veritiv "failed to meet [its] burden of proof that . . . Ramirez signed the acknowledgment." Substantial evidence supports this finding. Veritiv admitted it was unable to locate an acknowledgement with Ramirez's signature, including in Ramirez's personnel file. Veritiv argued, however, that she must have signed the acknowledgement because the signature was a condition to receiving sales commissions. In response, Ramirez submitted her declaration stating that she "never received the arbitration agreement" and "did not sign an acknowledgement form like the ones attached to DeCaire's declaration." She also supported these statements by stating that Unisource changed her compensation to salary with no commissions in 2012, implying that her assent to an arbitration agreement was not required because she did not earn any commissions.

In a paragraph in his reply declaration (which the court considered because it specifically overruled evidentiary objections to this paragraph), DeCaire stated that

Ramirez did receive commissions in 2012 and the beginning of 2013, and attached supporting evidence. In her surreply (which the court apparently did not consider), Ramirez stated that after reviewing Veritiv's evidence, she "maintain[ed her] position that [she] never received the arbitration agreement" and never "sign[ed] any acknowledgment form."

On this record, the court had a reasonable basis to find Ramirez credible that she never signed an arbitration agreement or an acknowledgement of the Unisource Arbitration Agreement and never otherwise agreed to be bound by the Unisource Arbitration Agreement.

Veritiv's arguments to the contrary are unavailing.

Veritiv mainly argues that the court erred because it failed to consider rebuttal evidence showing that Ramirez did receive sales commissions in 2012 and 2013. However, it appears the court did consider portions of this rebuttal evidence because it overruled plaintiffs' objection to this paragraph of DeCaire's reply declaration. Veritiv relies on a statement in the court's written order that "[t]he court disregards the surreply and the new evidence submitted in the reply." However, as discussed below, viewed in context of the entire written order, the reference to the "new evidence" appears to be referring to the new evidence produced by plaintiffs in their surreply. (See part II.B., *post*.)

Further, any such error was not prejudicial because the court's order makes clear the court assumed Ramirez earned sales commissions in 2012 through 2013, but found the receipt of these commissions insufficient to show Ramirez signed the

acknowledgement form. The court explained that "merely because it was Unisource's 'practice' to obtain a signed acknowledgement [as a condition of receiving commissions], does not establish the practice was strictly enforced." The court stated that Veritiv "failed to meet [its] burden of proof that . . . Ramirez signed the acknowledgement, [and] this court will not imply the existence of such an agreement between the parties merely because [she] received commissions."

Second, Veritiv contends the court's conclusion was erroneous because the court applied an incorrect "implied-in-fact" contract theory. Veritiv argues the court "misapprehended" Veritiv's legal theory and did not recognize that Veritiv was seeking to provide "through circumstantial evidence that Ramirez *actually signed* the Agreement." Veritiv's argument is not supported by the record.

Absent evidence to the contrary, we are required to presume the court understood the parties' arguments and applied the correct law. (See *People v. Thomas* (2011) 52 Cal.4th 336, 361.) The court stated it recognized Veritiv's theory to be that it was seeking to "prove the existence of an arbitration agreement by means of circumstantial evidence." But the court disagreed that the circumstantial evidence proffered by Veritiv proved the fact that Ramirez signed the agreement. The court had a reasonable basis to reach this conclusion.

Contrary to Veritiv's assertions, the fact that the court cited to *Gorlach v. Sports Club Co.* (2012) 209 Cal.App.4th 1497 does not show the court applied a wrong legal theory. In *Gorlach*, the undisputed evidence showed the employee did not sign the arbitration agreement and the reviewing court found no implied-in-fact arbitration

agreement arose because the evidence showed the employer had required a signature before the arbitration agreement would be effective. (*Id.* at pp. 1505, 1507-1511.) This case is different because Veritiv asserted that the plaintiff did sign the acknowledgement. However, after finding Veritiv did not meet its burden of proof on this issue, the court did not prejudicially err in considering—and then rejecting—an implied-in-fact contract theory.

Third, Veritiv argues the court erred in finding it did not meet its initial burden by proffering DeCaire's declaration. Generally, the party seeking arbitration meets his or her initial burden by showing the existence of an agreement to arbitrate, which can be accomplished with a copy of a signed arbitration agreement. (See *Rosenthal*, *supra*, 14 Cal.4th at p. 413; *Espejo*, *supra*, 246 Cal.App.4th at pp. 1058-1060; *Ruiz*, *supra*, 232 Cal.App.4th at p. 846; see also *Condee v. Longwood Management Corp*. (2001) 88 Cal.App.4th 215, 218.) Veritiv did not produce a signed arbitration agreement and instead relied on a statement by DeCaire that he was aware of Unisource's policy to require arbitration in 2012 as a condition of earning sales commissions. This evidence arguably did not meet Veritiv's burden to show admissible evidence of a signed arbitration agreement particularly because Veritiv did not initially present evidence that DeCaire had personal knowledge of this policy.

In any event, the court's written ruling reflects that it did not rely solely on the deficiencies in DeCaire's initial declaration to reach its factual conclusion. Specifically, the court found Unisource did have a policy of requiring employees to sign arbitration agreements, but was unwilling to assume this policy was followed as to Ramirez. This

conclusion was reasonable, particularly given Ramirez's denials that she signed the agreement; the absence of a signed acknowledgement form; and a lack of any evidence showing Unisource adhered to certain procedures for confirming each employee had signed the acknowledgement form. In the end, it was Veritiv's burden to show Ramirez had agreed to arbitration. The court had an ample basis to find that Veritiv did not satisfy this burden.

B. *French*

The court found Veritiv did not meet its burden of proof that French "signed the acknowledgement," and, as with Ramirez, declined to imply the existence of an agreement merely because French received sales commissions and Unisource maintained a policy of requiring commissioned sales employees to agree to arbitration. Based on these findings, the court found Unisource and French had not agreed to arbitrate their claims and therefore denied Veritiv's motion to compel arbitration of French's claims.

Substantial evidence supports the court's conclusions. On penalty of perjury, French denied signing the acknowledgement and unequivocally said the signature on the acknowledgement was not his signature. He also said he never authorized anyone else to sign the agreement on his behalf. French noted that the form asks for the signatory to print his or her name, and the printed name on the form was not a correct spelling of French's first name (Alan) (the printed name has two "*l*"s and appears to have an "e" rather than an "a" for what should be the third letter). Additionally, the form was dated "8/8/2011," long before the Unisource Arbitration Agreement was purportedly distributed (in 2012). Although it is possible this was a clerical mistake, individuals do not usually

write the wrong year during the eighth month of the year. Based on its examination of French's additional signatures submitted by Veritiv with its reply papers, the court stated the samples appear to contain a different style "F" in French's signature than does the acknowledgement. The court also noted that "[n]o declaration was presented by a handwriting specialist to overcome French's declaration."

Based on the totality of the evidence, the court reached a reasonable conclusion. The court was justified in accepting French's statements as credible and finding French's statements were supported by a comparison of the acknowledgement form and the various signatures in his file. The court's factual finding was additionally supported by the irregularities on the acknowledgement form (e.g., the wrong date and the misspelling of the printed name).

Veritiv argues the court erred because it improperly required Veritiv to prove the genuineness of French's signature before plaintiffs disputed the authenticity of the signature. The argument is not factually supported. Although the court noted in its ruling that DeCaire did not disclose that he was familiar in 2012 with Unisource procedures for obtaining signatures on the acknowledgement form, it also stated that "DeCaire can testify based upon personal knowledge there was an acknowledgement in French's file." The court did not deny Veritiv's motion based on its conclusion that Veritiv failed to meet an *initial* burden to show French's signature was authentic. Rather, the court's ruling reflects that it viewed both parties' submissions to reach its determination that Veritiv did not meet its burden to show a valid arbitration agreement. (See *Espejo, supra*, 246 Cal.App.4th at p. 1060 [after plaintiff "challenged the validity of

[his purported] signature," defendants had burden "to establish by a preponderance of the evidence that the signature was authentic"].)

Veritiv contends the court erred because it refused to consider the evidence presented with its reply brief. However, the record supports that the court did consider much of this evidence. And to the extent there was any error with respect to some of the evidence, the error was not prejudicial and thus not a basis to reverse the order.

To understand our conclusion, it is helpful to review what the court did and did not consider because its written order is somewhat confusing on this point. In support of its reply arguments as to French, Veritiv presented: (1) DeCaire's supplemental declaration stating that he became familiar with Unisource's policies and procedures through review of documents, "including its policy of requiring its commissioned outside sales employees to enter into arbitration agreements"; (2) DeCaire's statement he never fabricated or forged any document or directed anyone to do so; (3) additional documents found in French's personnel file (attached to DeCaire's reply declaration): (a) an August 9, 2012 letter to French at a Unisource address, stating it was enclosing a Unisource commission plan agreement, the Unisource Arbitration Agreement, and "your signed acknowledgement of receipt"; and (b) several samples of French's signatures on documents contained in French's personnel file; and (4) the declaration of Sagowitz (French's direct supervisor since 2012).

Plaintiffs objected to the court considering some of this evidence because it was "new" evidence, but also asserted specific evidentiary objections to the information in items 1 and 2 above, and to Sagowitz's entire declaration. Plaintiffs did not assert

objections to the court considering the materials attached to DeCaire's supplemental declaration or to the paragraph in the declaration discussing these materials.

In its written ruling, the court initially stated it would "disregard[] the surreply and the new evidence submitted in the reply," but then stated it considered "the rebuttal declaration of Douglas DeCaire with regard to the additional signatures of plaintiff French." And the court discussed its evaluation of the handwriting samples attached to DeCaire's reply declaration. The court also overruled plaintiffs' objections to the paragraph in DeCaire's declaration and Sagowitz's declaration in which they denied forging French's signature or directing anyone to do so.

On this record, the court's ruling cannot be fairly interpreted as reflecting the court's refusal to consider any of the reply evidence relating to French. The court clearly did so. At most, as to French, the court ruled inadmissible: (1) DeCaire's statement (in his reply declaration) that he was familiar with policies and procedures at Unisource through his review of documents, and particularly of its "policy of requiring its commissioned outside sales employees to enter into arbitration agreements"; and (2) portions of Sagowitz's declaration.

Even assuming the court erred in failing to consider this evidence, the court's error was harmless. First, with respect to the paragraph in which DeCaire asserts that he is familiar with Unisource's policies through review of documents, DeCaire mentioned only Unisource's policy that outside sales employees must enter into arbitration agreements to earn a commission. As noted above, the court assumed that this policy existed, but was

unwilling to infer from the fact of this policy that the policy was followed with respect to French.

Second, with respect to Sagowitz's declaration, Sagowitz did not state or suggest he was aware, or had any personal knowledge about, whether French signed an acknowledgement form reflecting his assent to the arbitration agreement. Nor did Sagowitz provide any authentication of the disputed signature. Instead, he discussed only his general practice regarding providing *commission plan documents* and commission plan acknowledgement forms to employees and said he did not recall French failing to sign such documents. Sagowitz never mentioned an arbitration agreement or an arbitration agreement acknowledgement form. He never said he discussed the arbitration agreement with French or that he provided that agreement to him. Thus, Sagowitz's declaration had only marginal relevance to the issue whether French signed the form acknowledging receipt of the Unisource Arbitration Agreement.

On our review of the reply evidence the court did not consider, we are satisfied the court would have reached the same conclusion had it reviewed these documents. An appellate court does not reverse a judgment for the erroneous exclusion of evidence unless the exclusion was prejudicial and caused a miscarriage of justice. (§ 475; Evid. Code, § 354; see *F.P. v. Monier* (2017) 3 Cal.5th 1099, 1107-1108; *Christ v. Schwartz* (2016) 2 Cal.App.5th 440, 447.) An appellant is required to demonstrate "it is reasonably probable a result more favorable to the appellant would have been reached absent the error." (*California Crane School, Inc. v. National Com. for Certification of Crane Operators* (2014) 226 Cal.App.4th 12, 24.) Veritiv did not meet this burden.

Veritiv alternatively contends the court erred in declining to order French's claims to arbitration because the court was "under the misperception" that Veritiv was required to produce expert testimony in the form of a handwriting expert. We agree expert testimony is not required to establish the genuineness of a signature. (See Evid. Code, § 1417; *Devereaux v. Frazier Mountain Park & Fisheries Co.* (1967) 248 Cal.App.2d 323, 330.) But the court's order does not reflect the court was unaware of this principle. Although the court noted Veritiv did not present a handwriting expert to overcome French's declaration, it did not suggest such a declaration was required. Instead, the court's statements show its understanding that a factfinder is competent to compare signatures to resolve disputed signature issues. The court's evaluation of the handwriting evidence and conclusion regarding the signature was not the result of any legal error.

In light of our determination that substantial evidence supports the court's conclusion that the signature on the acknowledgement form was not French's signature and that the court's failure to consider certain evidence was not prejudicial, we reject Veritiv's suggestion that this court should reconsider the facts to reach our own factual determination. This court does not reweigh the evidence and must draw all reasonable inferences in support of the court's factual conclusions. The fact the evidence could have supported a contrary finding has no bearing on this substantial evidence analysis. " ' " 'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a

determination depends.' " [Citation.]' " (*Bloxham v. Saldinger* (2014) 228 Cal.App.4th 729, 750.)

C. *Pereyda*

Unlike its findings as to French and Ramirez, the court found Veritiv met its burden to show Pereyda signed the acknowledgement form. The court further found the Unisource Arbitration Agreement was not substantively unconscionable, and rejected Pereyda's argument that *McGill*, *supra*, 2 Cal.5th 945 barred arbitration of his claims, finding that (unlike in *McGill*) the Unisource Arbitration Agreement permitted a plaintiff to seek and obtain injunctive relief in arbitration.

But the court nonetheless declined to compel Pereyda to arbitration based on its findings that: (1) the acknowledgment is "ambiguous at best" because it stated only that the employee "understand[s]" that the Unisource Arbitration Agreement governs the employment relationship, rather than any reference to an "agreement" that the employee will be bound by the Unisource Arbitration Agreement; and (2) "four of the five class plaintiffs . . . are proceeding with this court action." These determinations do not support the court's ruling denying Veritiv's motion to compel arbitration.

On the first finding, Pereyda's signed acknowledgement states: "I have received and reviewed the . . . Agreement Concerning Arbitration of Disputes and understand that they apply to my employment with Unisource." The Unisource Arbitration Agreement (titled "Agreement Concerning Arbitration of Disputes") states: "By acknowledging receipt of this Agreement and continuing your employment with the Company, you hereby agree that any dispute with any party . . . must be submitted" to mandatory

binding arbitration. There is no ambiguity in these words. By signing the acknowledgement form and understanding that the agreement mandating arbitration applies to his employment, Pereyda necessarily agreed to be bound by the provisions. No other conclusion is reasonable. (See *Harris v. TAP Worldwide, LLC* (2016) 248 Cal.App.4th 373, 377; *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 172 (*Serafin*).)

In reaching a contrary conclusion, the court relied on *Mitri v. Arnel Management Co.* (2007) 157 Cal.App.4th 1164, 1173 (*Mitri*). In *Mitri*, the defendant employer did not produce a signed arbitration agreement, and instead relied on (1) the employee handbook's statement that all employees would (in the future) be required to sign an arbitration agreement, and (2) the employee's signature that she had reviewed the employee handbook. (*Id.* at pp. 1167-1168, 1170-1173.) The form signed by the employees stated the employee handbook is " 'an excellent resource for employees' " and encouraged employees to " 'carefully review' " the handbook and handbook updates. (*Id.* at p. 1173.)

The *Mitri* court found neither the employee handbook nor the signed acknowledgment showed the plaintiffs had consented to binding arbitration. (*Mitri*, *supra*, 157 Cal.App.4th at pp. 1170-1173.) As to the employee handbook, the court found the arbitration reference "placed plaintiffs on notice that they would be called upon to sign a *separate* binding arbitration agreement," and thus did not itself constitute the binding agreement. (*Id.* at p. 1171.) As to the signed acknowledgment form, the court found "[c]onspicuously absent from the acknowledgement receipt form is any reference

to an *agreement* by the employee to abide by the employee handbook's arbitration agreement provision. Indeed the line preceding each plaintiff's signature on [the] acknowledgement receipt form explains, '[m]y signature acknowledges that I have read and understood the statements above as well as the contents of the Handbook, and will direct any questions to my supervisor or the Director of Human Resources.' " (*Id.* at p. 1173.) The court concluded that "[t]aken as a whole, the[se] documents . . . do not constitute an arbitration agreement" and "therefore . . . the trial court did not err by denying [the employer's] motion to compel arbitration." (*Ibid.*)

This case is different. Pereyda's signed acknowledgement form referred specifically to the Unisource Arbitration Agreement, and his understanding that he was bound by *this* agreement. Read in context, *Mitri*'s emphasis on the absence of the word "agreement" in the employee-handbook acknowledgment form does not suggest there is a particular magic to this word such that the use of the term "agreement" is a legal prerequisite to finding an enforceable arbitration agreement. Rather, the court was pointing out that the acknowledgment form merely referenced the employees' understanding that they were bound by the handbook, not that they agreed to the arbitration requirement or understood they were bound by an agreement that was required to be signed but which the employees had never seen or signed. (*Mitri*, *supra*, 157 Cal.App.4th at pp. 1170-1173; see *Serafin*, *supra*, 235 Cal.App.4th at pp. 173-175.)

"California contract law . . . determine[s] whether the parties formed a valid agreement to arbitrate." (*Mitri*, *supra*, 157 Cal.App.4th at p. 1170; accord *Pinnacle*, *supra*, 55 Cal.4th at p. 236.) Under this law, the meaning of a contract depends on the

parties' expressed intent, using an objective standard. (*Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 21.) We apply a de novo review standard to evaluate a trial court's contract interpretation. (*BRE DDR BR Whittwood CA LLC v. Farmers & Merchants Bank of Long Beach* (2017) 14 Cal.App.5th 992, 999.) Here, the undisputed evidence (the language of the arbitration agreement together with the signed acknowledgement form) show that Pereyda and Unisource (including Unisource's successors) entered into a bilateral contract to arbitrate their employment disputes. The court erred to the extent it reached a contrary conclusion.

On appeal, respondents contend the court also found that "Veritiv failed [to] establish that the acknowledgement [signed by Pereyda] was directly related to the Unisource Arbitration Agreement presented to the court." This finding cannot be fairly inferred from the court's order. Although the court discussed the deficiencies with DeCaire's declaration based on his lack of personal knowledge of prior events, the court did so solely with respect to its analysis of the evidence pertaining to Ramirez and French, and the issue whether they signed the acknowledgements. In the motion to compel arbitration as to Pereyda, the court noted that Pereyda did not dispute his signature on the acknowledgement in the personnel file, and discussed provisions of the Unisource Arbitration Agreement. Interpreting the court's ruling in a reasonable manner, the court found Veritiv adequately proved the Unisource Arbitration Agreement was the agreement referred to in Pereyda's acknowledgement form. This finding was supported by the factual record.

The court's alternative ground for refusing to order arbitration of Pereyda's claims is legally unsupported. The court stated: "[T]here are now four of the five class plaintiffs who are proceeding with this court action. Even if the court could find Pereyda consented to arbitration, the court denies [Veritiv's] motion to remove only one plaintiff to arbitration. Although this court acknowledges the Federal Arbitration Act governs, the court will not ignore . . . section 1281[.2(c)], and the increase[d] risk of conflicting rulings on common issues of fact or law, as well as the waste of judicial resources and burden on plaintiffs."

The court's conclusion was proper if California procedural arbitration law applied to the interpretation of the Unisource Arbitration Agreement. (See § 1281.2(c); *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 383-394 (*Cronus*); *Williams v. Atria Las Posas* (2018) 24 Cal.App.5th 1048, 1053-1054; see also *Rosenthal, supra,* 14 Cal.4th at p. 407, fn. 6.) Section 1281.2(c) permits a court to stay arbitration or decline to enforce an arbitration agreement if the arbitration could result in determinations inconsistent with the outcome of related litigation not subject to arbitration. (See *Abaya v. Spanish Ranch I, L.P.* (2010) 189 Cal.App.4th 1490, 1497.)

Section 1281.2(c) is a procedural rule that applies to motions to compel arbitration brought in California courts, even if the arbitration contract involves interstate commerce governed by FAA substantive provisions. (*Cronus, supra,* 35 Cal.4th at pp. 388-393; see *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford University* (1989) 489 U.S. 468, 476; *Judge v. Nijjar Realty, Inc.* (2014) 232 Cal.App.4th 619, 631-632.) This principle, however, is subject to the parties' contrary agreement. (*Cronus,* at p. 394.)

If parties expressly agree that FAA procedural law applies to the arbitration agreement, then section 1281.2(c) is not a proper basis for a California court to deny a motion to compel arbitration. (*Cronus*, at p. 394; see *Rodriguez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, 1122.)

The parties' agreement here reflects that they intended FAA procedural law would apply to the enforcement of their arbitration agreement. The second paragraph of the Unisource Arbitration Agreement states that the FAA "shall govern the interpretation *and enforcement* of this Agreement." (Italics added.) In a later provision, the agreement elaborated on this rule:

> "Unless otherwise agreed, binding arbitration under this Agreement shall be conducted [in Los Angeles or San Francisco], whichever is closer to your most recent location of employment. The *substantive law of the United States and the State of California shall govern the underlying dispute*, as would be the case in a court or administrative proceeding, *but again, the Federal Arbitration Act, 9 U.S.C. § 1 et seq., shall govern the interpretation and enforcement of this Agreement.* The arbitration shall be conducted before one neutral arbitrator selected by both parties from [JAMS], and both the arbitrator selection and the underlying arbitration shall be conducted in accordance with the rules promulgated by JAMS in effect at the time the claim(s) are initiated, provided if those rules are inconsistent with this Agreement, the terms of this Agreement shall Govern." (Italics added.)

Under the FAA enforcement rules, pending litigation with parties who have not agreed to arbitrate the matter is not a valid ground to deny or stay arbitration. (*Dean Witter Reynolds Inc. v. Byrd* (1985) 470 U.S. 213, 216-221; see *Los Angeles Unified School Dist. v. Safety National Casualty Corp.* (2017) 13 Cal.App.5th 471, 479 (*Los Angeles*); *Mastick v. TD Ameritrade, Inc.* (2012) 209 Cal.App.4th 1258, 1263.) Thus,

unlike California law, the FAA "*requires* piecemeal resolution [of a dispute] when necessary to give effect to an arbitration agreement." (*Moses H. Cone Memorial Hospital v. Mercury Construction Corp*. (1983) 460 U.S. 1, 20.)

To support their argument that the court properly applied California procedural arbitration law, respondents cite only to *Los Angeles, supra,* 13 Cal.App.4th 471. That case is distinguishable. There, the arbitration agreement did not contain *any* reference to the FAA or to a choice of law. (*Id.* at p. 479.) The defendant nonetheless argued that the FAA procedures applied because the contract involved interstate commerce. (*Id.* at p. 477.) The Court of Appeal disagreed, explaining that California procedural rules are the default rules, and apply unless the parties expressly designate that the FAA procedural provisions shall apply. (*Id.* at pp. 479-482; see *Cronus, supra,* 35 Cal.4th at p. 394*; Valencia v. Smyth* (2010) 185 Cal.App.4th 153, 173-174; see also *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 922.)

Pereyda's case falls within the express-agreement exception because the parties agreed in their arbitration agreement that although California or federal law governs "the underlying dispute, . . . *the [FAA] shall govern the interpretation and enforcement of this Agreement.*" (Italics added.) (See *Mount Diablo Medical Center v. Health Net of California, Inc.* (2002) 101 Cal.App.4th 711, 722 (*Mount Diablo*).) In *Mount Diablo,* the court was presented with an analogous but reverse situation: the contract provided " 'the validity, construction, interpretation and enforcement of this Agreement' " shall be governed by California law. (*Id.* at p. 722.) The reviewing court found this "broad, unqualified and all-encompassing" language supported a conclusion that section

1281.2(c) applied. (*Mount Diablo*, at p. 722.) The court explained: "The explicit reference to enforcement reasonably includes such matters as whether proceedings to enforce the agreement shall occur in court or before an arbitrator. Chapter 2 (in which § 1281.2 appears) of title 9 of part III of the California Code of Civil Procedure is captioned 'Enforcement of Arbitration Agreements.' An interpretation of the choice-of-law provision to exclude reference to this chapter would be strained at best." (*Ibid*.) The California Supreme Court later quoted this discussion in *Mount Diablo* with approval in explaining the proper analysis for determining the applicability of section 1281.2(c) to a contract involving interstate commerce. (*Cronus*, *supra*, 35 Cal.4th at p. 387.)

Under these principles, the parties' agreement that California or federal law applies to the underlying dispute, "*but*" the FAA applies to the "enforcement" of the arbitration agreement, means that the parties intended the FAA procedural provisions—and not state law procedural rules—would apply in resolving arbitration agreement enforcement issues. (Italics added.) Those issues include whether a court can decline to enforce an arbitration agreement under section 1281.2(c) because of the possibility of duplication or inconsistent outcomes. Because the FAA procedural rules apply, the court erred in denying arbitration of Pereyda's claims based on section 1281.2(c).

Accordingly, the court erred in refusing to order Pereyda's non-PAGA claims to arbitration and enforcing Pereyda's class action waiver contained in the arbitration agreement to which he agreed. Veritiv requests that this court issue orders staying the litigation of the French and Ramirez claims pending the resolution of Pereyda's

arbitration proceedings. We decline to do so. This is a matter for the trial court in the first instance.

DISPOSITION

The court shall vacate its November 17, 2017 order denying Veritiv's motion to compel arbitration of the claims asserted by plaintiffs Pereyda, French, and Ramirez. The court shall enter a new order denying Veritiv's motion to compel arbitration of all claims asserted by plaintiffs French and Ramirez and denying Veritiv's request that their class claims be dismissed. The court shall also enter a new order granting Veritiv's motion to compel arbitration on an individual basis of all claims asserted by Pereyda, except for the PAGA claims. The court shall dismiss Pereyda as a named plaintiff in the class claims and shall determine whether to stay Pereyda's PAGA litigation pending the completion of the arbitration of his individual claims.

The parties are to bear their own costs.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

GUERRERO, J.